

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HAKEAI T. FAANUNU and SELA LEPOLO
TELUA,

No. C 03-01487 JSW

Plaintiffs / Appellants,

v.

GAIL DIXON,

**ORDER RE: BANKRUPTCY
APPEAL**

Defendant / Appellee.

Now before the Court is Hakeai Faanunu and Sela Lepolo Telua's ("Appellants") appeal from the judgment by the bankruptcy court dated March 17, 2003 in favor of Defendant/Appellee Gail Dixon. Although Appellee failed to oppose the appeal, pursuant to Civil Local Rule 16-4, the Court deems this case submitted on the papers without oral argument. Having carefully reviewed the administrative record and considered the parties' papers, their arguments and the relevant legal authority, and good cause appearing, the Court hereby AFFIRMS the bankruptcy court's judgment.

BACKGROUND

In 1989, Appellants purchased real property from Gail Dixon ("Dixon"), aka Gail Carlette, located at 820 Hamilton Avenue, in Menlo Park, California (referred to herein as "the Property"). (Clerk Transcript ("CT") at 1-16.) In the course of the purchase, Appellants gave Dixon two notes secured by a second and third deed of trust on the Property, representing payment of a portion of the purchase price of \$149,000. (CT at 44-45.) Dixon was a licensed

1 real estate broker at this time. (CT at 20.)

2 On September 17, 1999, Appellants filed a Chapter 13 bankruptcy petition in the United
3 States Bankruptcy Court for the Northern District of California, case no. 99-33029. (CT at 118-
4 143.) On June 29, 2001, Dixon moved for relief from the automatic stay in order to permit her
5 to foreclose on the Property. (CT at 54-56.) On August 7, 2001, the bankruptcy court granted
6 the motion, “finding that [Appellants] had failed to make numerous pre-petition and post-
7 petition payments on the deeds of trust, and that [Appellants] did not intend to pay the third
8 deed of trust.” (CT at 1-5, 148.)

9 On August 23, 2001, Appellants filed a complaint in San Mateo County Superior Court,
10 case no. 418077, seeking to enjoin Dixon from foreclosing under the second and third deeds of
11 trust. (CT at 280-305.) The complaint alleged nine causes of action against Dixon arising from
12 Appellants’ purchase of the Property from Dixon in 1989. (CT at 280-305.) On August 31,
13 2001, Dixon removed the action to the bankruptcy court. (CT at 360.)

14 Dixon filed a motion for summary judgment and the bankruptcy court granted the
15 motion on all but the fifth cause of action and the related claim for declaratory and injunctive
16 relief. (CT at 149.) The fifth cause of action sought cancellation of the third deed of trust and
17 alleged that Dixon obtained this deed of trust from Appellants through fraud. (CT at 290-92.)
18 Appellants alleged that Dixon was a licensed real estate broker and that, as both the seller and
19 broker, she acted as a dual agent in the transaction. (CT at 280-292.) Appellants further alleged
20 that Dixon contracted in writing to sell the Property to them for \$133,000 and that she later
21 tricked them into giving her an additional note for \$16,000 secured by the third deed of trust,
22 which increased the purchase price of the Property to \$149,000. (CT at 290-92.)

23 On March 17, 2003, the court entered judgment for Dixon and held that Appellants were
24 not entitled to cancel or restrain the enforcement of either of the two deeds of trust held by
25 Dixon against the Property. (CT at 144-46.) The court determined as a matter of law that
26 Dixon did not defraud Appellants in obtaining the third deed of trust as part of the purchase
27 price for the Property and that no legal basis existed to cancel the second or third deeds of trust
28

1 or to enjoin their enforcement. (CT at 152-53.) All other pertinent findings of fact and
2 conclusions of law of the bankruptcy court will be discussed below where relevant.

3 ANALYSIS

4 A. Standard of Review of Bankruptcy Court's Judgment.

5 District courts have jurisdiction to hear appeals from final judgments, orders, and
6 decrees of bankruptcy judges. 28 U.S.C. § 158. On appeal, a district court must review a
7 bankruptcy court's findings of fact under the clearly erroneous standard, and its conclusions of
8 law de novo. Fed. R. Bankr. P. 8013; *see also Beck v. Pace Int'l Union*, 427 F.3d 668, 673 (9th
9 Cir. 2004). The test for clear error is not whether the appellate court would make the same
10 findings, but whether the reviewing court, based on all of the evidence, has a definite and firm
11 conviction that a mistake has been made. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573
12 (1985). A reviewing court may not overturn a decision, even if it would have weighed in the
13 evidence in a different manner, so long as the trial court's view of the evidence is plausible in
14 light of the entire record. *Id.* at 573-74. In applying the clearly erroneous standard, the
15 appellate court views the evidence in the light most favorable to the party who prevailed below.
16 *Lozier v. Auto Owners Ins. Co.*, 951 F.2d 251, 253 (9th Cir. 1991).

17 B. The Bankruptcy Court Did Not Err in its Findings of Fact and Conclusions of Law Regarding Dixon's Duties to Appellants.

18 Appellants contend that the bankruptcy court erred by not finding that Dixon was a dual
19 agent with a duty of disclosure to Appellants. (Br. at 9.) They argue that Dixon did not comply
20 with her duty as a dual agent to disclose "all facts that would reasonably affect the judgment of
21 each party in permitting the dual agency." (*Id.* at 11.) In particular, Appellants contend that
22 Dixon had a duty to disclose the actual value of the Property. (*Id.* at 12.) Appellants also claim
23 that they suffered harm as a result of Dixon's failure to disclose "all information regarding the
24 subject real property." (*Id.* at 12.) However, analysis of dual agency law and the record below
25 reveals that the bankruptcy court did not err in its conclusions of law and findings of fact
26 regarding Dixon's duties to Appellants.
27
28

1 **1. The Bankruptcy Court Did Not Conclude that Dixon Was Not a Dual Agent.**

2 Appellants contend that the bankruptcy court erred by not finding that Dixon was a dual
3 agent with a duty of disclosure to Appellants. The bankruptcy court, however, never concluded
4 that Dixon was not a dual agent. Rather, the court found that Dixon signed the purchase-sale
5 agreement as the seller, using the name Gail Carlette, and as the broker, using the name Gail
6 Dixon. (CT at 149, 406.) The court concluded that “*even if* [Dixon] was acting as a seller and a
7 dual agent, [Dixon] as seller was not obligated to limit the price she asked, and [Dixon] as a
8 dual agent was not obligated to convey to [Appellants] her knowledge about the price she was
9 willing to accept as seller.” (CT at 153 (citing Cal. Civ. Code § 2079.21) (emphasis added).)
10 The court never reached the conclusion that Dixon was not acting as a dual agent.

11 **2. Even If Dixon Did Act as a Dual Agent, She Was Only Required to Disclose**
12 **Material Information about the Property but Was Not Obligated to Disclose**
13 **the Actual Value of the Property.**

14 Appellants argue that Dixon had a duty to disclose “*all* information regarding the
15 subject real property.” (Br. at 12 (emphasis added).) However, the agent’s duty to the buyer
16 requires disclosure of “*all material facts*,” not simply all facts. *Roberts v. Lomanto*, 112 Cal.
17 App. 4th 1553, 1567 (2003) (emphasis added). The test of materiality is an objective one. *Id.*
18 It depends on “whether a reasonable person in the principal’s position would have acted
19 differently had he known the undisclosed facts.” *Id.* However, a dual agent “may not, without
20 the express permission of the respective party, disclose to the other party that the Seller will
21 accept a price less than the listing price or that the Buyer will pay a price greater than the price
22 offered.” Cal. Civ. Code § 2079.16; *see also* Cal. Civ. Code § 2079.21.

23 Here, Appellants argue that Dixon was required to disclose the Property’s actual value
24 because they would have acted differently had they known such information. However, by
25 making such a disclosure, Dixon would be informing Appellants that the seller would accept a
26 price less than the listing price. As the court correctly held, Dixon was not obligated to make
27 such a disclosure. Furthermore, Appellants do not refer to any other material facts that Dixon
28 was required to disclose. The bankruptcy court found that there “were no flaws in the Property,
or other ‘facts materially affecting the value or desirability of the Property’” that Dixon failed to

1 disclose to Appellants. (CT at 151.) The bankruptcy court's view of the evidence is not clearly
2 erroneous in light of the entire record. *Anderson*, 470 U.S. at 573-74. Therefore, the
3 bankruptcy court did not err by concluding that Dixon did not fail to disclose material
4 information about the Property.

5 **3. Even If Dixon Did Act as a Dual Agent, the Remedy Appellants Seek for**
6 **Any Disclosure Failure on Her Part Is Not Available.**

7 A real estate agent is required by statute to make certain disclosures about the agent's
8 duties to the parties and about which party or parties to the transaction the agent is representing.
9 Cal. Civ. Code §§ 2079.13-24. An agent may serve in a dual capacity as long as both principals
10 have full knowledge and give knowing consent to the relationship. Cal. Civ. Code § 2079.16;
11 *Sierra Pac. Indus. v. Carter*, 104 Cal. App. 3d 579, 581-82 (1980).

12 There are essentially two disclosures that all agents must make regarding their
13 representation of and duties to the parties. The selling agent must disclose to the buyer and
14 seller, as soon as practicable, "whether the selling agent is acting in the real property transaction
15 exclusively as the buyer's agent, exclusively as the seller's agent, or as a dual agent
16 representing both the buyer and the seller." Cal. Civ. Code § 2079.17(a). "This relationship
17 must be confirmed in the contract to purchase and sell real property or in a separate writing
18 executed or acknowledged by the seller, the buyer, and the selling agent prior to or coincident
19 with execution of that contract by the buyer and the seller, respectively." *Id.* This required
20 confirmation must be in the form as set out in California Civil Code § 2079.17(c). *Id.* Here,
21 assuming Dixon did act as a dual agent, it appears that she complied with this disclosure
22 requirement. The proper confirmation appears in the March 1989 Purchase Contract. (CT at
23 13.)

24 In addition to this confirmation, the agent must comply with California Civil Code
25 § 2079.14. *See* Cal. Civ. Code § 2079.17(a) (stating that the confirmation required by Cal. Civ.
26 Code § 2079.17(a) is in addition to the disclosure required by Cal. Civ. Code § 2079.14).
27 Under California Civil Code § 2079.14, listing and selling agents must provide a copy of a
28 disclosure form to the seller and buyer. In the case of a dual agency, the disclosure form
indicates that a

1 dual agency is legal but only with the knowledge and consent of the seller and buyer. Cal. Civ.
 2 Code § 2079.16. The form also states the dual agent's duties to the respective parties. *Id.* In
 3 particular, the form states that the dual agent "may not, without the express permission of the
 4 respective party, disclose to the other party that the Seller will accept a price less than the listing
 5 price or that the Buyer will pay a price greater than the price offered." *Id.*; *see also* Cal. Civ.
 6 Code § 2079.21.

7 The disclosure form tells the property owner that a broker can act as a dual agent.
 8 *Huijers v. DeMarrais*, 11 Cal. App. 4th 676, 684 (1992). "Thus advised, the seller [or buyer]
 9 may wish to sell [or buy] the property through his or her own agent or seek independent advice
 10 on the price and terms of the listing." *Id.* "It is not enough to disclose only the fact of dual
 11 representation." *Id.* at 686. The agent must also disclose all facts which would reasonably
 12 affect the judgment of each party in permitting the dual representation. *Id.* In *Huijers*, the court
 13 interpreted then applicable California Civil Code § 2375 (currently codified at § 2079.16) as a
 14 "legislative determination that the information required to be disclosed [in the disclosure form]
 15 alerts the parties to the potentially harmful consequences of dual representation, so they can
 16 make an informed judgment." *Id.* Here, assuming that Dixon did act as a dual agent, the record
 17 below does not indicate that she supplied the disclosure form required by § 2079.14.¹

18 However, even if Dixon did fail to provide the statutorily required form, the remedy
 19 Appellants seek for such failure is not available. The remedy for the failure to disclose a dual
 20 representation is avoidance of the transaction and relief from the compensation agreement.
 21 *Huijers*, 11 Cal. App. 4th at 685-86. For these remedies, "[i]t makes no difference that the
 22 principal was not in fact injured, or that the agent intended no wrong, or that the other party
 23 acted in good faith." *Id.* at 686. However, the right to rescind must be exercised promptly on
 24 discovery of the dual representation. *Vice v. Thacker*, 30 Cal. 2d 84, 91 (1947). In addition, all
 25 consideration received from the other party to the transaction must be returned and any property
 26

27 ¹ On appeal, Appellants do not claim that Dixon failed to supply the required
 28 disclosure form; they only claim that Dixon failed to disclose "all information about the
 property, including the fact that the property's actual value . . . was far less than the selling
 price." (Br. at 12.)

1 received must be reconveyed. *Id.* If the principal has accepted the advantage obtained under
2 the contract and seeks to retain such advantage, he “will not be permitted to disclaim the
3 responsibility for the representations and concealments of . . . his agent.” *Gordon v. Beck*, 196
4 Cal. 768, 773 (1925). Here, Appellants do not seek relief from the compensation agreement
5 with Dixon, nor do they seek avoidance of the entire transaction. Rather, they seek to retain the
6 subject real property and cancel the third deed of trust. (CT at 182, 290.) In order properly to
7 rescind the contract, they would need to reconvey the real property to Dixon. Therefore, the
8 remedy Appellants seek for Dixon’s failure to provide the disclosure form as a dual agent is not
9 available.

10 Appellants’ only other alternative would be to sue Dixon for damages. The damage
11 remedy, however, is limited to whatever monetary loss the principal can prove on account of the
12 agent’s misconduct. *Brown v. FSR Brokerage, Inc.*, 62 Cal. App. 4th 766, 778 (1998). Here,
13 the record lacks any evidence supporting Appellants’ argument that they suffered in reliance on
14 Dixon’s advice. The bankruptcy court found that Appellants “suffered no damage as a result of
15 any failure by [Dixon] to disclose her status as a real estate broker, or as a result of the way the
16 terms of the parties’ agreement were set forth in the March purchase-sale agreement and the
17 March 16 addendum to that agreement.” (CT at 151.) The bankruptcy court’s view of the
18 evidence is not clearly erroneous in light of the entire record. *See Anderson*, 470 U.S. at 573-
19 74. Therefore, even assuming that Dixon acted as a dual agent, Appellants do not seek a
20 remedy that is available as a result of her failure to provide a statutorily required disclosure
21 form. The bankruptcy court did not err in its findings of fact and conclusions of law regarding
22 Dixon’s duties to Appellants.

23 **C. The Bankruptcy Court Did Not Err by Excluding Evidence of an Appraisal**
24 **Conducted on the Real Property.**

25 At trial, Appellants attempted to introduce evidence of an appraisal performed in 2003
26 estimating the fair market value of the Property in March 1989. (CT at 177.) The bankruptcy
27 court excluded this evidence as irrelevant. (CT at 152.) Appellants contend that such exclusion
28 constituted reversible error. (Br. at 12.) Courts review decisions regarding the relevance of

evidence for abuse of discretion. *United States v. Kessi*, 868 F.2d 1097, 1107 (9th Cir. 1989).

Appellants claim that Dixon had a duty to disclose the fair market value of the Property, contending that if she had done so, they would not have agreed to purchase the Property for a higher price. (Br. at 12.) As previously addressed, an agent has a fiduciary duty to disclose material facts to the buyer. *Roberts v. Lomanto*, 112 Cal. App. 4th 1553, 1567 (2003). The test of materiality is an objective one. *Id.* It depends on “whether a reasonable person in the principal’s position would have acted differently had he known the undisclosed facts.” *Id.* However, as the bankruptcy court correctly concluded, the dual agent “may not, without the express permission of the respective party, disclose to the other party that the Seller will accept a price less than the listing price.” Cal. Civ. Code § 2079.16; *see also* CT at 153. Assuming she acted as a dual agent, Dixon was not obligated to inform Appellants that she, as the seller, would accept a price less than the listing price. Therefore, the appraisal evidence was irrelevant to a determination of Dixon’s duties.

The bankruptcy court further found the appraisal evidence irrelevant because Appellants “did not offer any evidence that [Dixon] made any misrepresentation related to the value of the Property, other than [Appellants’] argument that [Dixon’s] asking price was in excess of the fair value of the Property.” (CT at 152.) The bankruptcy court’s view of the evidence is not clearly erroneous in light of the entire record. *See Anderson*, 470 U.S. at 573-74. Therefore, the court did not abuse its discretion by excluding the appraisal evidence as irrelevant.

D. The Bankruptcy Court Did Not Err by Applying the Current California Civil Code Sections Regarding the Duties of a Real Estate Agent.

Appellants contend that the bankruptcy court applied the wrong California Civil Code section when it evaluated Dixon’s duties as a broker because different statutes were in effect at the time of the transaction. (Br. at 15.) They argue that the court should have applied former California Civil Code § 2375, which required “real estate agents to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties.” (Br. at 15.)

In 1989, the year the subject transaction occurred, the duties of real estate agents were

1 governed by former California Civil Code §§ 2373 through 2382. Section 2375 set out the
2 disclosure form contents currently stated in § 2079.16. Although § 2079.16 was not operative
3 in 1989, the language of the statute is identical to the language of § 2375. *See* Cal. Civ. Code
4 § 2079.16. As in former § 2375, the disclosure form in § 2079.16 states that the buyer's agent
5 has a duty to "disclose all facts known to the agent materially affecting the value or desirability
6 of the property that are not known to, or within the diligent attention and observation of, the
7 parties." In addition, the form in §2079.16 and in former § 2375 states that a dual agent "may
8 not, without the express permission of the respective party, disclose to the other party that the
9 Seller will accept a price less than the listing price." Because the statutory language did not
10 change from former § 2375 to now operative § 2079.16, the bankruptcy court did not err by
11 applying § 2079.16. Under both statutes, Dixon was not obligated to disclose to Appellants that
12 she, as the seller, would accept a price less than the listing price. Therefore, the bankruptcy
13 court did not err by applying the current California Civil Code sections to Dixon's duties as a
14 real estate agent.

15 **E. The Bankruptcy Court Did Not Abuse Its Discretion by Refusing to Allow**
16 **Appellants to Introduce Evidence Regarding Violations of the Truth in Lending**
Act.

17 In their first amended trial brief before the bankruptcy court, Appellants attempted to
18 admit evidence regarding violations of the Truth in Lending Act ("TILA"), violations that they
19 had never alleged in their complaint. (CT at 178.) Dixon objected to the evidence on the
20 grounds of relevance. (Trial Transcript ("Tr. Trans.") at 8.) "Given the complaint that was
21 filed and given the summary judgment that was granted," the court declined to allow
22 amendment of the complaint at that late date and sustained Dixon's objection to the evidence.
23 (Tr. Trans. at 13-14; CT at 149.) Appellants now contend that the bankruptcy court erred by
24 refusing to hear their arguments regarding TILA and by refusing to allow them to introduce
25 proof of TILA violations into evidence. (Br. at 16.) They contend that they were not trying to
26 amend the complaint; rather, they argue that they were trying to introduce evidence relevant to
27 the remaining causes of action. (Br. at 16-17.)
28

Courts review decisions regarding the relevance of evidence for abuse of discretion. *Kessi*, 868 F.2d at 1107. TILA requires creditors to disclose certain key terms and costs to consumers before consummating a credit transaction. 15 U.S.C. §§ 1601-1667. After considering Appellants' arguments regarding the relevance of the TILA violation evidence, the court concluded that such evidence failed to address the remaining issues in the case. (Tr. Trans. at 13.) According to the court, the only questions left concerned determining the purchase price of the Property and determining whether the third note for \$16,000 was part of the consideration for the Property. (Tr. Trans. at 13.) The only cause of action remaining after summary judgment alleged that Dixon obtained the third deed of trust through fraud by entering into a written contract to sell the Property to Appellants for \$133,000 and later tricking Appellants into giving her an additional note for \$16,000 secured by the third deed of trust. As the court concluded, this remaining cause of action had no connection to disclosures required under TILA. Therefore, the bankruptcy court did not abuse its discretion by excluding the evidence regarding TILA violations as irrelevant.

CONCLUSION

For the foregoing reasons, the judgment entered by the bankruptcy court in favor of Defendant on March 17, 2003 and the underlying findings of fact and conclusions of law are AFFIRMED.

IT IS SO ORDERED.

Dated: February 24, 2006


JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE